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May 17, 2019

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Brett Thibodeau, President
Dynamic Energy Solutions, LLC
1550 Liberty Ridge Drive, Suite 310
Wayne, PA 19087
Certified Mail #: 7010 2780 0000 6105 4614

Re: 60-Day Notice of Violations and Intent to File Suit Regarding Noncompliance with Federal Clean Water Act: 103 Briar Hill Road, Williamsburg, MA

Dear Mr. Thibodeau,

We write to give notice that the Massachusetts Attorney General's Office intends to file a civil action on behalf of the Commonwealth of Massachusetts in the United States District Court for the District of Massachusetts under section 505 of the Federal Clean Water Act, 33 U.S.C. § 1251, et seq. (the "Clean Water Act" or "the Act") against Dynamic Energy Solutions, LLC ("Dynamic") for violations occurring at its commercial solar array facility and access roadway in Williamsburg (the "Array Site" or the "Site"). The subject of the action will be Dynamic's failure to comply with the federal Environmental Protection Agency's ("EPA's") General Permit for Discharges from Construction Activities (the "Permit")[1] which is applicable to its construction activities at the Site. The complaint will also allege violations of the Massachusetts Wetlands Protection Act and the Massachusetts Clean Waters Act.

Dynamic constructed the 18.5-acre Array up-gradient of the West Branch Mill River (the "River") in Williamsburg without designing or implementing stormwater controls as required by the Federal Clean Water Act. As a result, Dynamic caused muddy water to be discharged in extreme amounts from the Site, eroding the hillside, scouring out intermittent streams, uprooting trees, destroying streambeds, filling in wetlands with sediment, and causing the River to become brown and turbid. Dynamic's violations have adversely impacted the River, its tributaries including Rogers Brook, and its associated wetlands.

[1] EPA most recently reissued the Permit in 2017. 82 Fed. Reg. 6534 (January 19, 2017).

The Attorney General's Office will ask the Court to order Dynamic's future compliance with the Act, assess civil penalties in an appropriate amount,[2] award the Commonwealth its litigation costs, including attorney and expert fees, and award any other relief the Court deems appropriate. The Commonwealth's complaint will be filed a minimum of 60 days after the postmark date of this letter. This is a formal 60-day notice of intent to sue that is being served pursuant to 40 C.F.R., Part 135.

This notice is being provided by the Commonwealth of Massachusetts, acting by and through the Office of Attorney General Maura Healey. Counsel for the Commonwealth of Massachusetts in this case is:

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BACKGROUND

The Site

Dynamic has constructed and is operating the Array Site on approximately 18.5-acres of what was previously a sand and gravel removal operation at 103 Briar Hill Road, Williamsburg. A portion of the access roadway to the Site is in the Town of Goshen. The Site is on a south-facing hillside that spans approximately 1800 feet, at a slope of between 5% and 12% and receives runoff from approximately 25 acres of undeveloped land to the north. The West Branch Mill River runs near the west and south side of the Array Site.

The West Branch of the Mill River and Its Tributaries and Associated Wetlands

The Mill River is a 13.5-mile-long tributary of the Connecticut River that originates in Ashfield and runs through several towns before its confluence with the Connecticut River in Northampton. Once the location of serious flood events, today the river knits together a diverse landscape and offers numerous recreational opportunities. The Mill River, the West Branch Mill River, and its tributary Rogers Brook, have been designated by the Commonwealth as "Coldwater Fish Resources." Coldwater Fish Resources are particularly sensitive habitats used by reproducing coldwater fish to meet one or more of their life history requirements.

The West Branch Mill River and Rogers Brook in the vicinity of the Array Site are within an area designated by the Commonwealth as "Core Habitat" critical for the long-term persistence

[2] The Statute authorizes the Court to assess a penalty of up to $53,484 a day for each violation of the Act. *See* 33 U.S.C. § 1319(d) and 83 Fed. Reg. 1190, 1193 (Jan. 10, 2018).

of a state-listed "Species of Conservation Concern" known as the Northern Spring Salamander.[3] These waters have also been designated as "Aquatic Core Habitat" for the coldwater fish species that inhabit them. Less than three miles downstream of the Array Site lies estimated habitat for a species of rare dragonfly known as the Ocellated Darner. The Ocellated Darner's habitat may be adversely impacted by Dynamic's violations.

The Array Site is also close to several tributary creeks and wetlands. The tributary creeks and wetlands within the Mill River watershed are important in protecting aquatic resources by acting as a natural filtering system for water quality, for mitigating downstream flooding, and by providing habitats to native species. The health and viability of these wetlands and tributaries significantly affects the health and integrity of the Mill River, the West Branch Mill River, and Rogers Brook.

Potential Pollutant Sources and Pollutants

EPA has identified sediment pollution as the most significant cause of water quality degradation in rivers and streams in the United States. Excessive sediment discharged to waterways destroys habitat, harms aquatic organisms, and can contribute to flooding. Polluted stormwater is the leading cause of water quality impairment in Massachusetts. Sediments such as sands, clays and silts are the most common pollutants in stormwater runoff by volume and weight. Sediment discharge significantly harms Massachusetts waters. Excess sediment clouds the water and makes it difficult or impossible for aquatic plants to grow. Sediment also destroys aquatic habitats. It smothers smaller organisms that live on the bottom of rivers, streams and wetlands, and starves the larger organisms that feed on them. Sediment also causes flooding by filling up areas that absorb rainwater and by altering riverine flows.

Construction site erosion can be the most significant source of sediments in waterways and wetlands. When vegetation is removed from construction sites, soils are exposed and made more mobile, allowing erosion to begin. The severity of erosion is influenced by the amount of exposed soil, soil type, slope and rainfall. Clearing an entire site and leaving soils exposed until construction and landscaping is completed greatly increases the potential for erosion. Erosion also increases on long, steep slopes and on sites with erodible soils.

[3] According to the Massachusetts Department of Fish & Game, protection of Core Habitat "is essential to safeguard the diversity of species and their habitats, intact ecosystems, and resilient natural landscapes across Massachusetts." Massachusetts Department of Fish & Game, Division of Fisheries & Wildlife and The Nature Conservancy, BioMap2: Conserving the Biodiversity of Massachusetts in a Changing World (2010).

DYNAMIC'S VIOLATIONS AND DATES OF VIOLATIONS

A. THE REQUIREMENTS OF THE ACT

1. Pollutant Discharges Without a Permit Are Illegal.

The Clean Water Act makes the discharge of pollution into waters of the United States unlawful unless the discharge complies with certain statutory requirements, including the requirement that the discharge be permitted by EPA under the National Discharge Elimination System ("NPDES"). *See* sections 301(a), 402(a), and 402(p) of the Act, 33 U.S.C. §§ 1311(a), 1342(a), and 1342(p). This prohibition applies to discharges from certain construction activities.

2. Operators of Construction Sites Must Comply with EPA's Construction General Permit.

To address the significant threat to water quality from construction activities, EPA issued a General Permit for Construction Activities ("Permit") under the NPDES program. The Permit's conditions are intended to prevent the discharge of sediment-laden stormwater from construction activities to waters of the United States. An operator (sometimes referred to herein as "developer") of a construction project that will disturb one or more acres of land must obtain coverage under the Permit prior to commencing construction activities. The Permit defines "construction activities" to include "earth-disturbing activities, such as the clearing, grading, and excavation of land, and other construction-related activities ... that could lead to the generation of pollutants." Permit, Appendix A, pg. A-2.

Under the Permit, developers must conduct advanced planning to analyze the potential for erosion, sedimentation, and other pollutant discharges from their construction activities, and to design, install, and maintain stormwater controls to minimize stormwater pollutant discharge during construction. Permit, Part 2.1. The advanced planning requirement is designed to ensure that stormwater controls are fully installed and operational *before* initial site clearing, grading, excavating, and other earth-disturbing activities commence. Permit, Part 2.1.3.

As a first step in the advanced planning process, a developer must prepare a stormwater pollution prevention plan ("SWPPP"). The SWPPP must adequately describe: the factors relevant to selecting stormwater controls; the stormwater controls selected; the maintenance requirements for stormwater controls; and the developer's procedures for training, inspections, and corrective action. Permit, Part 7. The SWPPP must include a site map, showing:

- property boundaries;
- locations where construction activities will occur, including but not limited to:
  - locations where earth-disturbing activities will occur (noting any phasing),
  - approximate slopes before and after grading activities;

  - locations where sediment, soil or other construction materials will be stockpiled;
  - any water of the U.S. crossings;
- type and extent of pre-construction cover on the site;
- drainage patterns of stormwater before and after major grading activities;
- stormwater discharge locations; and
- locations of stormwater controls.

Permit, Part 7.2.4.

The SWPPP must also include a description of the construction activities, Permit, Part 7.2.3, and a description of stormwater controls. Permit, Part 7.2.6. The Permit sets forth certain factors to be included among those considered by developers in designing their stormwater controls. Permit, Part 2.1.1. These include:

- the expected amount, frequency, intensity, and duration of precipitation;
- the nature of stormwater runoff and run-on at the site, including factors such as expected flow from impervious surfaces, slopes, and site drainage features; and
- the soil type and range of soil particle sizes expected to be present on the site. Part 2.1.1 of the Permit.

Stormwater controls must be designed and installed in accordance with good engineering practices, Permit, Part 2.1.2, and be properly maintained. Permit, Part 2.1.4.

The Permit provides that the following controls should generally be included in the SWPPP and implemented by the developer:

- maintain appropriate natural buffers if the site is within 50 feet of a water of the United States (Part 2.2.1);
- direct stormwater to vegetated areas and maximize infiltration and filtering (Part 2.2.2);
- install perimeter sediment controls (Part 2.2.3);
- minimize sediment track-out (Part 2.2.4);
- appropriately manage sediment-laden piles (Part 2.2.5);
- minimize soil compaction (Part 2.2.9);
- use erosion controls and velocity dissipation devices to minimize erosion of stormwater conveyance channels and their embankments, outlets, adjacent streambanks, slopes, and downstream waters (Part 2.2.10);
- properly design and maintain impoundments such as sediment basins (Part 2.2.12);
- promptly stabilize exposed portions of the site (Part 2.2.14); and
- establish long-term stabilization measures that will to remain in place after construction activities have ceased.

After completing the SWPPP, the developer must submit to EPA a "complete and accurate" Notice of Intent ("NOI") to be covered by the Permit. Permit, Part 1.4. It is a prerequisite for submitting an NOI that a SWPPP with the necessary components has already been developed. Permit, Part 1.4.1. According to the Permit, "[d]ischarges are not authorized if your NOI is incomplete or inaccurate...." Permit, pg. 5, n. 8.

Stormwater discharges must be controlled as necessary to meet applicable water quality standards. Permit, Part 3.0. The permit holder must also conduct regular site inspections to make sure all stormwater controls are installed and working properly, Permit, Part 4.6.1, and timely perform maintenance and corrective actions when they are not. Permit, Part 4.6.7. If a discharge is occurring during the inspection, the operator must identify its location and document its visual quality and characteristics. Permit, Part 4.6.6. If the site discharges to "high quality" or "Tier 2.5" waters, the permittee must inspect the site once every seven (7) calendar days and within 24 hours of the occurrence of a storm event of 0.25 inches or greater, or the occurrence of runoff from snowmelt sufficient to cause a discharge. Permit, Part 4.3. An inspection report must be prepared within 24 hours of completing the inspection. Permit, Part 4.7.

Permit holders must take corrective action to expeditiously repair or replace stormwater controls when necessary, and to eliminate any excessive stormwater pollution, water quality standard violation, or prohibited discharge. Permit, Part 5.0. When the problem requires a new or replacement control or significant repair, the work must be completed within seven calendar days of the day of discovery. *Id.* If it is infeasible to complete this work within the seven calendar day deadline, the permittee must document why that is, and document a schedule for installing stormwater controls and making them operational as soon as feasible thereafter. *Id.* The Permit also requires that staff be trained to implement its terms. Permit, Part 6.0;

B. DYNAMIC'S VIOLATIONS AND DATES OF VIOLATIONS

1. Violations of the Construction General Permit

Dynamic has violated numerous provisions of the Permit, as listed below. The following violations have occurred on a daily basis since August 3, 2018, and they are continuing to occur.[4]

a. Dynamic violated Part 1.4.1 of the Permit by submitting an inaccurate NOI to EPA. The company stated on its NOI that it had completed a SWPPP consistent with Part 7 of the Permit, but it had not. *See* Permit, Part 1.4.1.
b. Dynamic violated Part 7 of the Permit because it failed to prepare a SWPPP consistent with Part 7.

[4]The Commonwealth believes that the violations set forth in Section B(1) have occurred on each day since construction activities at the Site commenced, or Dynamic submitted its NOI, whichever occurred earlier. If the Commonwealth learns that construction activities at the Site took place before August 3, 2018, then the Complaint will include violations commencing on the day construction activities began. To the extent it is determined that rain days are relevant in determining the dates of violations, such rain dates from July 1, 2018 through April 30, 2019 are set forth on Exhibit A hereto. The complaint, when filed, will set forth additional rain dates since April 30, 2019.

c. Dynamic violated Part 1.4.3 of the Permit by allowing site work, including but not limited to removal of and movement of surface material, to commence before August 17, 2018 (14 days after NOI submittal date).
d. Dynamic violated Part 2.1.1 of the Permit by failing to consider the specific factors set forth in the Permit for the design of stormwater controls.
e. Dynamic violated Part 2.1.2 of the Permit by failing to use good engineering practices to design and install stormwater controls.
f. Dynamic violated Part 2.1.4 of the Permit by failing to properly maintain stormwater controls.
g. Dynamic violated Part 2.2.9 of the Permit by failing to minimize soil compaction.
h. Dynamic violated Part 2.2 of the Permit by failing to implement the other controls listed in that section, and on page 5, above.
i. Dynamic violated Part 3.0 of the Permit by failing to control its pollutants as necessary to meet applicable water quality standards.
j. Dynamic violated Part 4.0 of the Permit by failing to conduct regular site inspections, and by failing to otherwise meet the inspection requirements of the Permit.
k. Dynamic violated Part 5.0 of the Permit by failing to take timely corrective action to fix its violations and eliminate excessive stormwater pollution and sedimentation from the Site.
l. Dynamic violated Part 6.0 of the Permit by failing to properly train staff.

2. Pendent State Claims: Violations of the Massachusetts Wetlands Protection Act, and the Wetlands Regulations (G.L.c. 131, § 40; 310 C.M.R. § 10.00) and Violations of the Massachusetts Clean Waters Act and its Implementing Regulations (G.L. ch. 21, § 43(2); 314 C.M.R. § 3.00)

The Commonwealth's complaint, when filed, will allege that Dynamic violated the Massachusetts Wetlands Protection Act by discharging, without authorization, sediment to several Resource Areas and Buffer Zones (each as defined at 310 CMR 10.04) including waterways designated as Cold-Water Fisheries, and by allowing the sediment to remain in these areas. G.L. c. 131, § 40 and 310 C.M.R. §§ 10.02(2)(a); 10.05(4)(a); 10.08(1)(c). The complaint will further allege that Dynamic's sediment discharges, and failure to design and implement adequate sediment controls at the Array Site prior to commencing site work, violated the Massachusetts Clean Waters Act. G.L. c. 21, § 43(2) and 314 C.M.R. § 3.04(1)(prohibiting discharge of pollutants to waters of the Commonwealth without a Permit, and prohibiting activities that may reasonably result, directly or indirectly, in the discharge of pollutants to waters of the Commonwealth without a permit).

CONCLUSION

The Attorney General's Office believes this Notice of Violations and Intent to File Suit sufficiently states the basis for a civil action. During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of litigation. If you wish to pursue such discussions, please have your attorney contact us within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

COMMONWEALTH OF MASSACHUSETTS

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ATTORNEY GENERAL

By: _____

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ATTACHMENT A
DAYS BETWEEN
JULY 1, 2018 AND APRIL 30, 2019
ON WHICH STORMWATER FROM FACILITY
DISCHARGED TO WATERS OF THE UNITED STATES

Month/Year	Date
July 2018	17, 22, 23, 25, 26
August 2018	1, 3, 4, 17, 18, 22
September 2018	10, 12, 18, 25, 26, 28
October 2018	2, 11, 27, 29
November 2018	2, 3, 5, 6, 9, 13, 15, 16, 19, 26, 27
December 2018	2, 16, 21, 28, 31
January 2019	5, 20, 24
February 2019	6, 12, 24
March 2019	10, 22
April 2019	8, 13, 15, 20, 22, 26